

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and
Regulations Implementing the
Telephone Consumer Protection
Act of 1991

CG Docket No. 02-278

**REPLY COMMENTS OF ROBERT BIGGERSTAFF ON THE
PETITION OF CLUB TEXTING INC.**

Robert Biggerstaff hereby submits these reply comments in the Petition of Club Texting, Inc., for a Declaratory Ruling regarding the Commission's rules under the Telephone Consumer Protection Act (TCPA).

In introducing the TCPA, its author, Fritz Hollings, said:

Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.

The telephone is a basic necessity of life. You cannot get along in this country if you do not have a telephone in your home. However, owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls. These calls are a nuisance and an invasion of our privacy.

137 Cong. Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings); *See also*, 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("It is telephone terrorism, and it has got to stop.") Telephones and text messages are no less a necessity today. I urge the Commission that in any adjudicative decision, the intent of Congress and the broad remedial purposes of consumer protection are given precedence over private pecuniary interests that are counter to the purposes of the TCPA.

As a threshold issue, the analogies Club Texting and SoundBite Communications try to draw between fax broadcasting and text broadcasting are flawed. Some of the differences are as follows:

SMS text messages	Faxes
Limited size, and contains only text	Virtually unlimited size with text and images
No ID requirements in the TCPA	Explicit ID requirements in the TCPA
No "opt-out" notice requirements in TCPA	Explicit "opt-out" requirements in the TCPA
No call detail records maintained by carriers	Call detail records maintained by carriers
Does not use PSTN	Uses the PSTN

These differences all militate strongly against granting the Petition because text messages are much more prone to abuse, as the perpetrators can be impossible to identify. Text messages are the only cost-shifted advertising vehicle where recipients pay to receive the ads, but comprehensive identification of the sender is not required by any existing laws.¹

The better analogy of text messaging and text message broadcasters like Club Texting, is one of spam and an ISP serving a spammer. However, with spam, the Internet has two useful tools. One is the DNSBL (DNS-based Blackhole List, Block List, or Blacklist).² This allows operators of mail servers all over the globe to simply discard all mail coming from any source

¹ The TCPA imposes this requirement on advertising faxes and telemarketing calls, and the CAN SPAM Act imposes the requirements on advertising e-mails. Even if that identification were required, scofflaws ignore it. Nevertheless, the lack of that required information is frequently an easy identifier to distinguish legitimate messages from illegitimate ones.

² <http://en.wikipedia.org/wiki/DNSBL>. Use of such lists by ISPs are generally considered effective in preventing over 90% of spam from reaching consumers.

found to be used by spammers. The other tool is the strict liability imposed by the CAN SPAM Act on any beneficiaries of the spam. As a result, legitimate e-mail marketers cleaned up their act, and spam e-mail is now principally the domain of fake Viagra, mail-order diplomas, and other scams. **The key is that ISPs carefully vet any clients who want to send bulk e-mail and obtain indemnification agreements from those clients to protect the ISP if any of the e-mails are reported as SPAM that subjects the ISP to any damages. Text broadcasters must have a similar nondelegable and unavoidable incentive – though TCPA liability – to vet their clients and protect the 200 million cell phone users in this country from abusive spam text messages.**³

Unfortunately, neither blocklists or strict liability are currently available to the victims of text message spam. Text message spam is nearly unstoppable. The current state of text message spam is that in most cases:

- the sender is unidentifiable and untraceable, or if it is traceable, it traces back to a throwaway account or a fictitious name;
- the products sold are primarily downloads (such as ringtones), information services, or websites, so no physical address of a seller is known;
- even if sent by a “reputable” text broadcaster, that broadcaster will not cooperate or divulge to the victim any information about the client, or if they do, the client’s information is invariably bogus and untraceable;
- any domain names or websites mentioned in the text spam are invariably hosted overseas, registered with false information, or hidden by “proxy” registrations.

There is a lot of money in violating the TCPA and Commission rules. One illegal voice

³ Cell phone carriers can not take refuge in a blacklist as it would subject them to lawsuits under peerage and carrying contracts, and could even face Commission action, particularly in the case of telephone carriers that are common carriers.

broadcaster was paid over \$6 million by just one customer in only 10 months.⁴ As the Commission has learned, large fines against TCPA violators are often uncollectible and ignored by scofflaws.⁵ TCPA violators often engage in money laundering and brag about their “bulletproof” broadcasting facilities that can’t be traced.⁶ I personally received over 300 prerecorded telemarketing calls last year, and I was able to track down the people behind only a tiny fraction of those calls, despite my concerted efforts in recording calls, filing lawsuits, subpoenaing phone company records, and hundreds of hours of my own time. Anyone who tries to find the source of these illegal calls will find the vast majority lead back to shadowy, untraceable companies such as Transfers Argentina, Asia Pacific Telecom, TeleEurope, and Castle Rock Capital Management. Trying to track down a text message spammer is a similar exercise in futility.

Rampant TCPA violation is the one area where text message spam and junk faxes are similar. They have similar costs and similar response rates. A “hit-and-run” mentality abounds, where a large volume of text spam can be sent in a short time, income collected through offshore merchant accounts, and the scofflaw can disappear into the ether – only to do the same hit-and-run a month later with a new name, new web site, and a new product. Many of the web sites advertised in text message spam are dead only weeks after the messages were sent.

I also note that the reply comments of Gerald Roylance illuminate additional examples which are part of the existing practices of broadcasters and their clients that currently facilitate

⁴ See declaration of Roberto C. Menjivar at ¶30 (totaling the amount paid to Voice Touch by National Auto Warranty during a 10 month period at \$6,013,500). Document 42 in *FTC v. Network Foundations, LLC.*, No. 1:09-cv-02929 (N.D. Ill. 2009).

⁵ See *Order of Forfeiture*, File No. EB-02-TC-120 (released Jan. 5, 2004) (finding Fax.com liable for the maximum fine of \$11,000 for each of the 489 fax violations, for a total fine of \$5,379,000).

⁶Menjivar decl. at ¶¶20–22.

TCPA violations. These examples provide additional foundation for denying the instant Petition.

The only person who has direct contact with this text message scofflaw is the text broadcaster – which is why many scofflaws sign up for accounts with fictitious credentials. Since most text broadcasters operate a “pay in advance” system, fictitious names and addresses are irrelevant – no background check or credit application is involved or necessary. The money order or wire transfer cleared, so they don’t care what their client’s name or address is, as it is irrelevant to the text broadcaster. In the past, this same scheme was used by spammers in signing up with ISPs, but those ISPs quickly learned that they had to vet their new customers and take an active role in assisting prosecutions in order to prevent liability from being attached to the ISP itself for its customers’ spamming.

The Negative Example of Fax Broadcasting

The example of fax broadcasting is instructive.⁷ Because of the perceived partial liability shield wrongly adopted by the Commission, junk faxes continue to be rampant in this country, with billions of those junk faxes being sent every year.⁸ Whenever a fax broadcaster is found to be a source of junk faxes, it points to their terms of service or contract with its “client” which requires the “client” to comply with the law⁹, and then the fax broadcaster throws up its hands and says to the victim “nothing we can do – we cashed his check and that’s all we got on him.

⁷ As an aside, I believe the Commissions’ interpretation with respect to “fax broadcasters” was made in error, and based on a faulty premise that fax broadcasters were “like” common carriers. The reality is very different and they are nothing like common carriers, but rather mercenaries who strive to maintain “willful ignorance” of their client’s misdeeds. They lie, cheat, and delete records to protect their clients. They skirt Commission rules by assisting clients in getting fax number lists from third parties rather than the fax broadcaster providing them directly to the client. They act nothing like a common carrier.

⁸ William Glaberson, *Dispute Over Ads Draws Wide Scrutiny After Award*, The New York Times, July 22, 2001 <available at <http://www.nytimes.com/2001/07/22/national/22FAX.html>>.

⁹ Notably, the terms of use on Club Texting’s website contain similar language.

So we can't help you locate him." If the Commission endorses a similar loophole for text messages, the billions of junk faxes will quickly be surpassed by the billions of spam text messages.

Congress was aware of the scenario of "fly-by-night" fax broadcasters that would escape liability to reconstitute under a different name and serve the same advertisers. See, e.g., Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. (1989) (testimony of Prof. Ellis regarding "boiler room" type fax broadcasters that would dissolve and reconstitute to avoid liability). Liability of the *advertiser* put a stop to the "fly-by-night" broadcaster defense. But with text broadcasters, we now have fly-by-night *clients* too. These fly-by-night clients can only exist with tacit cooperation of the text broadcasters – the same text broadcasters that are now seeking a liability exemption. Liability of the text broadcaster is the proper way to address the fly-by-night clients.

The Commission's current rules "require that a facsimile broadcast service provider ensure that the identifying information of the entity on whose behalf the provider sent messages appear on facsimile messages." *In re the TCPA*, 12 FCC Rcd 4609 ¶2 (1997) (Order on Further Reconsideration).¹⁰ Yet none of the large fax broadcasters (Protus, j2, Westfax, Slingshot, et al.) do so. I have received over 400 junk faxes at my home, and I can count on one hand the number of those faxes that had proper identification under the above cited FCC order. What does it take to stop the cumulative theft of \$200 million a year in fax paper and ink? Give this history of

¹⁰ This does not mean that broadcasters must modify the content of the ads and become content authors – they are permitted to inspect the ad before sending it to ensure that the proper ID has been included by the client, and if it has not, to *instruct the client* that their ad does not comply with the broadcaster's terms of service (which require ads to comply with all provisions of the law and TCPA rules, expressly including proper identification).

existing “broadcasters” under the TCPA, what process leads to the conclusion that liability exemptions for the new kid on the block (text broadcasters) is a good idea or will turn out differently?

The old adage “fool me once, shame on you – fool me twice, shame on me” is applicable here. The Commission was fooled by fax broadcasters back in 1995. It should not be fooled by text broadcasters now, or else junk text messages will follow the well worn path of junk faxes in explosive growth at consumers’ expense.

Mere rules clearly don’t stop these scofflaws. Commission enforcement does not stop them. Liability in court with private enforcement is the only tool that seems to have any significant effect.

Liability of Text Broadcasters Will Serve Consumers

Placing liability on the shoulders of the text broadcaster makes perfect sense. Because they deal directly with their clients, they are in the best position to ensure that the client is operating within the law. They are in a position to contractually secure indemnification from the client and they have the incentive to ensure that the client will be around to fulfil an indemnification obligation. This arrangement is common with ISPs who employ similar constraints on any customers who want to send bulk e-mail that might be reported as spam if the client did not have bonafide permission to send the e-mails. As long as a text broadcaster deals with reputable clients who will indemnify the broadcaster for any TCPA violations that occur, a text broadcaster is fully protected from any TCPA liability. This is a minor duty given the fact that text broadcasters are shifting the cost of their advertising to potentially unwilling recipients

who will have to pay to receive the text message.¹¹

The alternative is untenable – a scofflaw client will make a profit, the “willfully ignorant” text broadcaster will make a profit, while the victim of the text message spam will have no recourse and be left to chase a ghost.

In this industry, there is a massive incentive to engage in the illegal conduct, so there should be extra onus on someone in that industry to make sure their facilities are not exploited by their customers to injure consumers. This is particularly true for text messages even more than faxes and telemarketing calls, because text messages are of limited size, so comprehensive identification of the senders is impossible.¹²

CONCLUSION

The Commission has an obligation to ensure consumer protection when executing its role in administering consumer protection statutes like the TCPA and particularly when applying them to new modes of communications with unique problems like text messages present. “The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers.”¹³ This truism is equally valid for text messages. The perfect storm of 1) cheap distribution, 2) immediately delivery, 3) anonymous sellers, and 4) no way to identify violators, ensures that text message spam will proliferate exponentially unless liability is placed with the text broadcaster along with his client.

¹¹ Most consumers also have to pay to send a “stop” message, and pay yet again to receive the “OK, we’ll stop” message.

¹² The TCPA and commission rules impose comprehensive identification requirements for faxes and prerecorded messages, that if applied to text messages would leave little – if any – room in the text message for the advertisement. Yet recipients of text message advertisements, no less than recipients of advertising faxes or telemarketing calls, are deserving of comprehensive identification of the senders.

¹³ *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, concurring).

Indeed, the only thing that has prevented this proliferation so far, is the potential liability of the text broadcasters who are the only ones who can be identified from phone company records. If the petition of Club Texting is granted, that last bulwark will fall.

Faxes and telemarketing calls are subject to rigorous limitations and identification requirements in the TCPA. **Text message have none** – no identification requirements, no time-of-day restrictions, no opt-out notice requirements, no “do-not-fax” lists, no “toll-free” contact requirements – and the limited characters in text messages makes proper identification¹⁴ **impossible**. Thus text broadcasters should most **certainly** be subject to a higher level of responsibility and liability and should certainly not be given a pass like fax broadcasters.

In summary, I respectfully request that the Commission take the following actions:

1. Establish a definition of “text broadcaster” as “a person or entity that transmits text messages on behalf of another person or entity for a fee or other consideration,”
2. Require that text message containing advertisements include a toll-free telephone number where the advertiser can be contacted and identified without the victim having to send a text message;
3. Require that text broadcasters must, upon request, provide information fully identifying their client to a complaining party;
4. Require call detail records (logs) of all text broadcasting activity to be retained by text broadcasters for a minimum of 4 years;
5. Reiterate that all broadcasters (fax, voice, and text) are required to inspect the messages they transmit in order to comply with the Commission’s directive in 1997 that they are required to affirmatively “ensure that the identifying information of the entity on whose behalf the provider sent messages appear on [facsimile, prerecorded, and text] messages;”

¹⁴ “Proper” identification would be, as for telemarketing calls, the “name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority).” See 47 C.F.R. 64.1200(b)(1).

6. Hold text broadcasters jointly and severable liability for TCPA violations along with their clients;
7. Declare that use of a computer or other device to send text messages using a list of numbers or addresses, is the use of an "automatic telephone dialing system" as defined by the TCPA and Commission rules.

Respectfully submitted,

/s/ Robert Biggerstaff